MOHAMED HANIF & ANOR. v. CHIN AH BAH

[O.C.J. (Chang Min Tat J.) December 7, 1973]
[Penang — Civil Suit No. 136 of 1973]

Practice and Procedure — Writ — Capacity of plaintiff — Running-down action.

In this action the plaintiffs describing themselves in the title to the writ as the administrators of the estate of the deceased victim of a motor accident, claimed general and special damages suffered by the estate of the deceased and by his dependants who were named in the indorsement. There was no description in the indorsement of the plaintiffs as such administrators, and there was no averment that the grant of letters of administration, if any, to the plaintiffs had been extracted.

Objection was taken to the writ after entry of conditional appearance on the contention that it was bad and reliance was laid by the defendant on *Bowler* v. *John Mowlem & Co. Ltd.*(1)

Held: as in the indorsement of the writ no capacity to sue was shown, the objection succeeded.

Cases referred to:-

(1) *Bowler* v. *John Mowlem & Co. Ltd.* [1954] 1 W.L.R. 1445, C.A.

(2) *Ingall* v. *Moran* [1944] K.B. 160.

[**Editorial Note:** See *Govindasamy Pillay & Sons Ltd.* v. *Lok Seng Chai & Ors.* [1961] M.L.J. where this point was raised for consideration.]

CIVIL SUIT.

Brijnandan Singh Bhar for the plaintiffs.

R. Rajasingam for the defendant.

Chang Min Tat J.: In this running-down action, the plaintiffs describing themselves in the title to the writ as the administrators of the estate of the deceased victim of the running-down, claimed general and special damages suffered by the estate of the deceased and by his dependants who were in the indorsement named as Leila Bevi the widow and two infant sons. There was no description in the indorsement of the plaintiffs as such administrators, and there was no averment that the grant of letters of administration, if any, to the plaintiffs had been extracted.

Objection is now taken to the writ after entry of conditional appearance on the contention that it is bad. Reliance is laid by learned counsel for the defendant on *Bowler* v. *John Mowlem & Co. Ltd.*(1)

I think that case firstly repeats the proposition that until the grant of letters of administration has been extracted the administrators are not clothed with a capacity to sue, see *inter alia*, *Ingall* v. *Moran*(2) and secondly re-establishes that a widow can sue in her personal rights. In *Bowler's* case, the fact that the widow was the person suing saved the writ from being struck out.

In this particular case, it was not the widow suing. The writ was taken out by two persons purporting to be administrators and described as such in the title to the writ but there is absent from the indorsement any averment that they had been granted the letters of administration or that they had before the issue of the writ extracted the grant, since even if they had obtained and extracted the grant a short time after the issue of the writ, however short it was, it did not relate back. Consequently in the indorsement of the writ, no capacity to sue was shown.

The objection succeeds. There must be an order setting aside the writ and all subsequent proceedings. The plaintiffs must unfortunately pay the costs.

Order accordingly.

Solicitors: *Triptipal Singh & Co.; R. Rajasingam & Co.*

DAMODARAN v. VASUDEVA

[O.C.J. (Syed Agil Barakbah J.) December 20, 1973]
[Alor Star — Originating Motion No. 38 of 1973]

Land Law — Caveats — Private caveats — National Land Code, ss. 323-327 and 329.

The question before the court was whether it was proper for two private caveats to be issued at the instance of the same applicant on the same land and on precisely the same grounds under the National Land Code.

Held: construing the relevant provisions of the Land Code as a whole, the only natural and logical construction that can be given by way of analogy is that they do not envisage the issue of a caveat when one is still in existence and the more so, on the same grounds.

Function of a caveat explained.

Cases referred to:-

(1) *In re Hitchcock* (1900) 17 W.N. (N.S.W.) 62, 63.

(2) *Lim Kiat Moy* v. *Hamzah* [1966] 2 M.L.J. 175 at p. 176.

(3) *K.I. Muhiudeen Rawther* v. *K.E.P. Abdul Kassim & Ors.* [1959] M.L.J. 257.

ORIGINATING MOTION.

Peter Mooney for the applicant.

K. Vijayanathan for the respondent.

Syed Agil Barakbah J.: This is an application by notice of motion at the instance of the applicant for an order that: —

(1) the caveat of October 1973, over the lands in the Mukim of Sungei Pasir, District of Kuala Muda, Sungei Patani, held under Kedah Grants 16830, 16831, 16832, 16833 and 31020 be removed;

(2) the respondent be restrained from applying for a caveat upon the said grants on the same ground as relied on in the application on August 20 and October 1, 1973; and

(3) costs be taxed and paid by the respondent to the applicant.

The applicant by affidavit claims to be the registered proprietor of the lands described above. On August 20, 1973, the respondent made an application for entry of a private caveat to the Collector of Land Revenue, Kuala Muda, accompanied by a statutory declaration that he (the respondent) was the "co-unregistered owner" of the said land. Notice of the entry of the caveat was duly served by the collector on the applicant on August 21, 1973. Subsequently on August 29, 1973, the applicant applied to the collector for the removal of the caveat under section 326 of the National Land Code. Pursuant to the application on September 7, 1973, the collector issued and served notice of intended removal in Form 19C of the

Code on the respondent. However, on October 1, 1973, *i.e.* before the removal of the said caveat, the respondent made a second application for entry of another caveat on precisely the same ground and over the same land to the collector. The application was supported by a statutory declaration in the same terms as the previous declaration. The applicant through his solicitors raised an objection by letter but the collector replied he had no grounds for refusing the issue of the second caveat which was duly entered on October 3, 1973. The dispute between the two parties is that the respondent, as stated in his affidavit, claims to be the unregistered co-owner (I think that is what he actually means) of the land on the strength of a letter dated November 23, 1971, which, it was alleged, both parties have signed as joint owners of the said land authorising one V. M. N. Menon of Kuala Lumpur to negotiate on their behalf for the development of the land into an housing estate. The applicant on the other hand maintains that his signature to the said letter had been obtained by deceit and the statutory declaration supporting the respondent's application for the caveats was completely false. No writ has been filed by the respondent to establish co-ownership, if the caveat is removed.

The question before me now is whether it is proper for two private caveats to be issued at the instance of the same applicant on the same land and on precisely the same grounds under the National Land Code.

At this stage I think it is necessary to explain that a caveat is not a remedy for a wrong. It has been described as "nothing more than a statutory injunction to keep the property in *status quo* until the court has had an opportunity of discovering what are the rights of the parties." (*Per* Owen J. in *In re Hitchcock*[1]). Its general function is to suspend the process of registration until conflicting claims have been settled. It is a unilateral act and no person can create rights in his own favour nor enlarge or add to his existing proprietary rights by means of a caveat. The effect of a private caveat under the National Land Code is to prohibit the registration, endorsement or entry on the register of the document of title pertaining to any dealing with the land in dispute so long as the caveat continues in force. It may be applied under section 323 in Form 19B with the Registrar and entered in accordance with the procedure provided by section 324. It may be withdrawn by the caveator at any time by notice in writing to the Registrar under section 325. Under section 326 the aggrieved party may apply to the Registrar and under section 327 to the court, for its removal. Section 326 enacts as follows: —

"326.(1) Any person or body whose land or interest is bound by a private caveat may at any time apply to the Registrar for its removal pursuant to this section, and the Registrar shall —

(a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and

(b) subject to sub-section (2), remove the caveat at the expiry of the period of one month specified in that notice.

(2) The court may, on the application of any person or body on whom such a notice has been served (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of one month; and the Registrar, on being duly served with any order of the court under this sub-section, shall not remove the caveat until the expiry of the said period as thereby extended."

Now, the section has to be construed according to the intention expressed therein. It is clear that once an application has been made for its removal and a notice of it is served by the Registrar upon the caveator, the former will remove the caveat on the expiry of the period of one month as specified in the notice unless the latter obtains a court order for its extension under sub-section (2). The court has power to extend the caveat from time to time on application by the caveator and the Registrar is required to remove the caveat on the expiry of the extended period if no further court order for extension is issued. The extension is not allowed as a matter of course but must be substantiated by reasonable grounds.

In the present case, the respondent on receipt of notice of the intention for the intended removal of the caveat from the Registrar on September 7, 1973, should have applied to the court for its extension under sub-section (2). Instead of doing so he applied for and obtained another caveat when the first caveat was still in existence. The result is that in the absence of such application for extension under sub-section (2) the first caveat according to sub-section (1)(b) must be removed by the Registrar on October 7, 1973, *i.e.* on the expiry of one month as specified in the notice. In other words, on that date the first caveat would no more be in existence.

Now, in answering the main question one has to look at sub-section (2) of section 326. The object of the sub-section is dealt with in precise detail by Raja Azlan Shah J. (as he then was) in *Lim Kiat Moy* v. *Hamzah*[2] which I accept with respect. It is clear that the word "extend" appearing in the sub-section has to be construed according to "its use in the common intercourse of mankind and the popular meaning attributed to it is that it enlarges or gives further duration to any existing right rather than re-vest an expired right". In other words, it points to the existence of a caveat which it allows to be extended by order of court from time to time. It does not speak of a re-creation as to allow the issue of another caveat on or before the expiry of the existing one. This is because once a caveat has lapsed and a memorial thereof is made by the registering authority, it is extinguished forever and the court has no power to revive, renew or continue a caveat after its lapse. The extinction is final and irrevocable. (*Per* Ong J. (as he then was) in *K.I. Muhiudeen Rawther* v. *K.E.P. Abdul Kassim & Ors.*[3]). If the sub-section were to be construed otherwise a great public injury would be effected by calling back a right that by lapse of time has become extinct. (*Per* Raja Azlan Shah J. (as he then was) in *Lim Kiat Moy's* case, *supra*). Further, section 328(1) provides for a caveat to lapse at the expiry of six years from the time from which it took effect unless earlier withdrawn or removed. Considering its object and function the period is long enough for one caveat to be in existence at any one time without there being entered another caveat.

The provisions of section 329(2) requires scrutiny. It disallows the Registrar to entertain any application for the entry of a further caveat if it is based on the like claim as that on which the former was based in

cases where the court has ordered the removal of the former or has turned down an application for extension of time. The sub-section may be construed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist. In other words, it is not a renewal, revival or continuance of the former; it speaks of an entirely separate caveat distinct from the other. In the light of the above, and construing the relevant provisions of the Code as a whole as regards the subject, the only natural and logical construction that can be given by way of analogy is that they do not envisage the issue of a caveat when one is still in existence and the more so, on the same grounds. To construe otherwise will contravene the real intention of Parliament and tend to oust the jurisdiction and power of the court under section 326 which arise in this case. If the law is allowed to be circumvented by recognising the second caveat the result will undoubtedly be an overlapping of caveats on the same land, on the same ground and by the same caveator.

I have no alternative but to order the caveat dated October 3, 1973, be removed in accordance with the first prayer. I order the second prayer be also granted in the circumstances and the costs of this application be taxed and paid by the respondent to the applicant.

Order accordingly.

Solicitors: *Skrine & Co.; Daljit & Vijaya.*

MENON v. ABDULLAH KUTTY

[F. C. (Azmi L.P., Ali and Raja Azlan Shah F.JJ.) February 3, 1974]

[Kota Bharu — Federal Court Civil Appeal No. 102/1973]

Practice and Procedure — Appeal — Application for further security for costs of appeal — Discretion of court — Federal Court (Civil Appeals) (Transitional) Rules, 1963, r. 18(1).

The respondent had obtained judgment against the appellant for possession of certain premises on 26th August 1973. The appellant appealed against the said judgment but did not pay the costs of the High Court action. On 30 September, 1973 the appellant applied for stay of execution and this was granted. The respondent thereupon applied to the Federal Court (a) for security for the unpaid costs; (b) for further security for the costs of appeal.

Held: (1) the trial judge had a discretion whether to grant a stay conditionally on providing security for costs or unconditionally and in this case he had granted an unconditional stay. As it had not been shown that his exercise of discretion was plainly wrong, the Federal Court could not interfere;

(2) the discretion to order further security for costs of an appeal lay with the Federal Court. In the circumstances of this case as there was no prior demand for security and the motion was not made at the earliest opportunity, the application for further security should be dismissed.

Cases referred to:-

(1) *Abu bin Mohamed* v. *Voo Fui Tong & Anor.* [1938] M.L.J. 140; [1938] M.L.J. Rep. 135, 137.

(2) *Hood Barrs* v. *Heriot* [1896] 2 Q.B. 376.

FEDERAL COURT.

A. Wilson for the appellant.

Datuk H. L. Wrigglesworth for the respondent.

Raja Azlan Shah F.J.: On 26th August, 1973 the plaintiff obtained judgment against the defendant in the High Court at Kota Bharu for immediate vacant possession of premises No. 40, Jalan Market, Pasir Mas and costs. The defendant continued to be in possession and has sublet the ground floor as a restaurant. The plaintiff continued to pay the rent at the rate of $110 p.m. ever since the termination of the partnership on 31st May 1970 for fear that the tenancy would be terminated by the landlord for arrears of rent.

The defendant has appealed against the said judgment but has not yet paid the costs of the High Court action.

On 30th September 1973 the defendant applied for a stay of execution. The plaintiff did not object but asked for security for the unpaid costs below and costs of the appeal. The judge has jurisdiction to order a conditional stay e.g. the defendant to provide security for past costs, but he granted an unconditional stay. He has clearly no jurisdiction to order further security for costs of the appeal. That is the province of a Federal Court Judge (section 44 Courts of Judicature Act, 1964).

The plaintiff now comes before this court. His application which was filed on 10th October 1973 is in two limbs: (a) for security for the unpaid costs below, and (b) for further security for costs of the appeal. He says the defendant is an impecunious litigant and cannot afford to pay the past costs which is estimated at well over $5,000, the cost of the appeal which is estimated at more than $2,500 and the rent which is estimated at $5,000 by the time the appeal is determined by the Federal Court, should the defendant fail in the appeal.

The defendant says he has a good ground of appeal in law, *i.e.* he is a protected tenant under the provisions of the Control of Rent Act, 1966.

With regard to the application for unpaid costs below it is plain that the trial judge has granted an unconditional stay. That is eminently a matter of discretion for him and unless it can be shown that his exercise of discretion is plainly wrong, this court will not interfere. Nothing of sufficient gravity has been established to entitle this court to take a different view of the matter.

Rule 18(1) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 gives this court a discretion to order further security for costs of an appeal "at any time, in any case where it thinks fit". Thus this is a discretionary remedy to be exercised in accordance with well known principles. This court is not bound by any hard and fast rules, but has to look at all the circumstances of the case. (See *Abu bin Mohamed* v. *Voo Fui Tong & Anor.*[1]).

Poverty of the defendant is a ground to increase the security for costs but where it exists, the court must consider other circumstances, whether in a particular case it will order further security to be given. As was said by Lord Usher, M.R. in *Hood Barrs* v. *Heriot*[2] which was quoted by Horne J. in *Abu bin Mohamed's* case, *supra*: